

Supreme Court, U. S.

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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1976

Case No. **76-857**

DORA M. FRAZIER,

Appellant,

vs.

ALUM CREST, ET AL.,

Appellees.

JURISDICTIONAL STATEMENT

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IN THE Supreme Court of the United States

October Term, 1976

Case No. _____

DORA M. FRAZIER,

Appellant,

vs.

ALUM CREST, ET AL.,

Appellees.

CITATION TO OPINIONS BELOW

The opinion filed in this case by the Court of Appeals of Franklin County, Ohio, is reported at 48 Ohio App. 2d 283 (1976), and is reprinted herein as Appendix B at page 9. The other lower court opinions are unreported, but are printed herein as Appendix A and Appendices C through H.

JURISDICTION

This action challenging the validity of Section 2743.01 of the Ohio Revised Code as construed with Section 2743.02(A) was heard by a three judge panel of the Court of Appeals of Franklin County, Ohio. The judgment of the court was entered on April 1, 1976. On September 24, 1976, the Supreme Court of Ohio *sua sponte* dismissed appellant's appeal as of right. Consequently, the appellant filed her notice of appeal to this Court with the Court of Appeals of Franklin County, Ohio on December 10th, 1976.

The jurisdiction of this Court to review the final judgment below by direct appeal is conferred by 28 U.S.C. §1257(2).

STATUTES INVOLVED

The state statute challenged in this litigation is Section 2743.01 of the Ohio Revised Code, as construed with Section 2743.02(A). The text of both sections is set forth below:

§2743.01 [Definitions]

As used in Chapter 2743. of the Revised Code:

(A) 'State' means the state of Ohio, including, without limitation, its departments, boards, offices, commissions, agencies, institutions, and other instrumentalities. It does not include political subdivisions.

(B) 'Political subdivisions' means municipal corporations, townships, villages, counties, school districts, and all other bodies corporate and politic responsible for governmental activities only in geographic areas smaller than that of the state to which the sovereign immunity of the state attaches.

[Pages Ohio Revised Code, Title 27, 1976 Supp., 85]

§2743.02 [State waives immunity from liability]

(A) "The state hereby waives its immunity from liability and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set forth in this chapter. To the extent that the state has previously consented to be sued, this chapter has no applicability."

[Pages Ohio Revised Code, Title 27, 1976 Supp., 85]

QUESTIONS PRESENTED

The questions presented by this appeal are:

1. Does Ohio's Court of Claims statute, Section 2743.01 of the Ohio Revised Code, as construed with Section 2743.02(A) offend the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States?
2. Does Ohio's Court of Claims statute, Section 2743.01 of the Ohio Revised Code, as construed with Section 2743.02(A) offend the fundamental right of access to the courts guaranteed by the First Amendment to the Constitution of the United States?
3. Does Ohio's Court of Claims statute, Section 2743.01 of the Ohio Revised Code, as construed with Section 2743.02(A) offend the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

On July 17, 1974, appellant Dora M. Frazier was admitted to Alum Crest, a nursing facility in Columbus, Ohio, owned and operated by Franklin County, and designed to provide skilled nursing care for the county's indigent. On July 24, 1974, Mrs. Frazier's arm was broken when she was negligently lifted by Alum Crest orderly Thomas Gall.

On July 2, 1975, suit was filed in behalf of the appellant against Alum Crest, the Franklin County Commissioners, and Thomas Gall (as John Doe, since his identity was not then known). Subsequent to the initiation of suit, Alum Crest and the Franklin County Commissioners filed a motion to dismiss, claiming that

the appellant's complaint failed to state a claim upon which relief could be granted.

On August 26, 1975, upon consideration of the motion, the court issued a decision to dismiss the complaint against Alum Crest and the commissioners upon the basis of sovereign immunity. Shortly thereafter, the appellant filed a motion to "reconsider and reverse decision" with the court and, upon learning the identity of the orderly, filed an amended complaint naming Thomas Gall as a defendant in the case.

The court, on September 15, 1975, indicated that although it had carefully considered appellant's motion, it was still unwilling to reverse its earlier decision. On September 23, 1975, final judgment was entered by the court, dismissing Dora Frazier's action against Alum Crest and the Franklin County Commissioners.

On October 7, 1975, defendant Thomas Gall filed a motion requesting the court to dismiss the amended complaint against him for failure to state a claim upon which relief could be granted. The memorandum filed in support of the motion relied solely on the same authority cited in the motion of July 29, 1975 filed on behalf of Alum Crest and the Franklin County Commissioners.

The court, on October 28, 1975, rendered a decision to dismiss the amended complaint against Thomas Gall and, subsequently, on November 3, 1975, entered final judgment dismissing the complaint.

Following the November 3, 1975, decision, the appellant appealed to the Court of Appeals of Franklin County, Ohio, which held on April 1, 1976, that the trial court erred in dismissing her claim against defendant Thomas Gall, and reversed its decision of November 3, 1975. The Court of Appeals, however,

did affirm the trial court's judgment of September 23, 1975, in favor of Alum Crest and the Franklin County Commissioners.

The appellant then appealed to the Supreme Court of Ohio as of right, which appeal was dismissed on September 24, 1976, upon the basis that "no substantial constitutional question" existed in the case.

The federal questions sought to be reviewed were first implicitly raised in the appellant's "motion to reconsider and reverse decision" filed in the Court of Common Pleas of Franklin County, and specifically raised on appeal to the Court of Appeals of Franklin County, Ohio, and on appeal to the Supreme Court of Ohio.

SUBSTANTIALITY OF FEDERAL QUESTIONS

THE LOWER COURT OPINION IS IN DIRECT CONFLICT WITH PAST DECISIONS OF THIS COURT.

In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972), this Court recognized that the right of access to the courts is one aspect of the right of petition for a redress of grievances guaranteed by the First Amendment. See *A First Amendment Right Of Access To The Courts For Indigents*, 82 YALE L.J. 1040, 1059-1060 (1973); *The Right Of Access To Civil Courts By Indigents: A Prognosis*, 24 AM. U. L. REV. 129, 150-151 (1974).

This Court further noted in *Gideon v. Wainwright*, 372 U.S. 335, 341 (1963), that the right of petition, which encompasses the right of access, is fundamental in nature and therefore, made "immune from state invasion" by the Fourteenth Amendment, a position reaffirmed in *Boddie v. Connecticut*, 401 U.S. 371

(1971). Boddie indicated that when the need for resort to the judicial process is state-created, as in this case where Mrs. Frazier's injuries were "state-created", the right of access is constitutionally protected and cannot lawfully be destroyed by state statute.

The lower court decision not only conflicts with these decisions, but illustrates as well that the lower court erroneously applied the "rational relation test" to the statute in question to determine whether or not it violates the Equal Protection Clause of the Fourteenth Amendment. Indeed, the Court of Appeals noted at 48 Ohio App. 2d 283, 288 (1976):

"The fact that the state waived (sovereign immunity) as to some circumstances and not others does not constitute a denial of the equal protection of the law. There is a rational basis for the distinction between the state itself and political subdivisions of the state."

Since the right of access to the courts is a fundamental right protected by both the First and Fourteenth Amendments, the court should have applied the "compelling state interest test" to determine the statute's constitutionality. *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *NAACP v. Button*, 371 U.S. 415 (1963).

CONCLUSION

This appeal raises important constitutional questions regarding the extent to which a state may, after *Boddie v. Connecticut*, limit the right of access to the courts guaranteed by the First and Fourteenth Amendments to the Constitution of the United States. In view of

this fact and the apparent conflict between the lower court's April 1, 1976 decision and past decisions of this Court, the appeal of Dora M. Frazier should be given plenary consideration.

CERTIFICATE OF SERVICE

I, Philip Q. Zauderer, a member of the bar of the Supreme Court of the United States, and one of the attorneys for Dora M. Frazier, appellant herein, hereby certify that on this 23rd day of December, 1976, I served three copies of this Jurisdictional Statement upon Charles I. Cohen, Assistant Prosecuting Attorney for Franklin County, Ohio, by delivery of the same personally at his office located in the Franklin County Hall of Justice, 369 South High Street, Columbus, Ohio, in compliance with Rule 33(3)(b) of the Rules of the Supreme Court of the United States; and that all parties required to be served have been served.

PHILIP Q. ZAUDERER

APPENDIX A
THE SUPREME COURT OF OHIO

1976 Term
 To wit: September 24, 1976

No. 76-617

**APPEAL FROM THE COURT OF APPEALS
 FOR FRANKLIN COUNTY**

DORA M. FRAZIER,
 Appellant,

vs.

ALUM CREST ET AL.,
 Appellees.

This cause, here on appeal as of right from the Court of Appeals for Franklin County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court *sua sponte* dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Franklin County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
 this day of 19.....
 Clerk
 Deputy

APPENDIX B
**IN THE COURT OF APPEALS
 OF FRANKLIN COUNTY, OHIO**

No. 75AP-547

DORA M. FRAZIER,
 Plaintiff-Appellant,

v.

ALUM CREST ET AL.,
 Defendants-Appellees.

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the decision of this court rendered herein on April 1, 1976, assignments of error 1, 2, 3, 4, and 5 are overruled, and assignment of error 6 is overruled as to the September 23, 1975, final judgment in favor of defendants Alum Crest and Franklin County Commissioners, but assignment of error 6 is sustained as to the November 3, 1975, judgment in favor of defendant Gall, and it is the judgment and order of this court that the September 23, 1975, final judgment of the Franklin County Court of Common Pleas in favor of defendants Alum Crest and Franklin County Commissioners is affirmed, and the November 3, 1975, judgment of the Franklin County Court of Common Pleas dismissing this action as against defendant Thomas Gall is reversed, and this cause is remanded to that court for further proceedings in accordance with law consistent with said decision.

HOLMES, WHITESIDE and McCORMAC, JJ.
 By
 Judge ALBA L. WHITESIDE

APPENDIX C
IN THE COURT OF APPEALS
OF FRANKLIN COUNTY, OHIO

No. 75AP-547

DORA M. FRAZIER,
Plaintiff-Appellant,

v.

ALUM CREST,
and

JOHN DOE,
(Name unknown),
C/o Alum Crest,

and

FRANKLIN COUNTY COMMISSIONERS,
HAROLD M. COOPER,
MICHAEL J. DORRIAN,
ROBERT T. SOUTHWICK,
(THOMAS GALL),
Defendants-Appellees.

D E C I S I O N

Rendered on April 1, 1976

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OHIO ACADEMY OF TRIAL LAWYERS,
ROBERT F. THORNTON, *President*,
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Amicus Curiae.

WHITESIDE, J.

Defendant has appealed from two judgments of the Franklin County Court of Common Pleas. The first judgment was entered September 23, 1975, dismissing plaintiff's action as against Alum Crest and the Franklin County Commissioners and, pursuant to Civ. R. 54(B), expressly finding no just reason for delay in entering such final judgment. Plaintiff filed a notice of appeal from that judgment on October 21, 1975. On November 3, 1975, a second judgment entry was entered, dismissing plaintiff's action as against defendant Thomas Gall and again determining, pursuant to Civ. R. 54(B), no just reason for delay in entering that judgment. On the same date, plaintiff filed a notice of appeal from that judgment, erroneously referring to it as having been entered October 3, rather than November 3, 1975. Unfortunately, the two appeals were not separately docketed in this court but are combined in this single appeal case.

In any event, plaintiff has raised six assignments of error in support of his appeals, as follows:

1. "The Franklin County Court of Common Pleas committed reversible error in dismissing the plaintiff-appellant's suit against the defendant-appellees on the basis of sovereign immunity, for the plaintiff-appellant has a fundamental right of access to Ohio's courts to seek redress for the grievances she sustained at the hands of a political subdivision of Ohio, which right is guaranteed by the First Amendment to the Constitution of the United States."
2. "The Franklin County Court of Common Pleas committed reversible error in dismissing the plaintiff-appellant's suit against the defendant-appellees on the basis of sovereign immunity, for the plaintiff-appellant has a fundamental right of access to Ohio's courts to seek redress for the grievances she sustained at the hands of a political subdivision of Ohio, which right is guaranteed by the Fourteenth Amendment to the Constitution of the United States."
3. "The Franklin County Court of Common Pleas committed reversible error in dismissing the plaintiff-appellant's suit against the defendant-appellees, for Ohio has no compelling state interest to lawfully justify a denial of the plaintiff-appellant's fundamental constitutionally protected right of access by the *de facto* maintenance of sovereign immunity for its political subdivisions."
4. "The Franklin County Court of Common Pleas committed reversible error in dismissing the plaintiff-appellant's suit against the defendant-appellees on the basis of sovereign immunity, for that immunity is maintained by Section 2743.01 of the Ohio Revised Code which, as construed with Section 2743.02(A), is unconstitutional in that it denies the plaintiff-appellant the equal protection of the law, guaranteed by the Fourteenth Amendment to the Constitution of the United States."

5. "The Franklin County Court of Common Pleas committed reversible error in dismissing the plaintiff-appellant's suit against the defendant-appellees on the basis of sovereign immunity, for the provision of Article I, Section 16 of the Ohio Constitution, which allegedly requires statutory consent as a prerequisite to suit against state instrumentalities, offends the Fourteenth Amendment to the Constitution of the United States, and unlawfully abridges the plaintiff-appellant's fundamental right of access to Ohio's courts."
6. "The Franklin County Court of Common Pleas committed reversible error in dismissing the plaintiff-appellant's suit against the defendant-appellees, for the cases upon which the lower court's decisions were based are distinguishable from the instant case and are, therefore, not controlling."

Plaintiff, by her complaint, alleges that she was negligently injured while a patient at Alum Crest, a nursing/medical care facility operated by the Franklin County Commissioners. Plaintiff brought her action against Alum Crest and the county commissioners in their official capacity. In addition, plaintiff joined defendant Thomas Gall, whom she alleges was an orderly employed at Alum Crest and negligently injured her.

As to defendants Alum Crest and the Franklin County Commissioners, the controlling case is *Schaffer v. Bd. of Trustees of the Franklin County Veterans Memorial* (1960), 171 Ohio St. 228, the syllabus of which reads simply, as follows:

"In the absence of statutory authorization therefor, a county or its agencies are immune from suit for negligence."

There is no statutory authorization for plaintiff to maintain an action against the county or its agencies

under the alleged circumstances. This being the case, this court has no choice but to follow the *Schaffer* case, which has been neither modified nor overruled by the Supreme Court itself, since this court is bound by and must follow decisions of the Ohio Supreme Court. *Thacker v. Bd. of Trustees of Ohio State Univ.* (1971), 31 Ohio App. 2d 17.

The Supreme Court has held that an action may be maintained against a municipal corporation for damages alleged to be caused by the negligence of an employee of a municipal hospital, the defense of governmental immunity not being available. *Sears v. City of Cincinnati* (1972), 31 Ohio St. 2d 157. However, in *Schaffer*, the Supreme Court expressly held that a county is not liable in tort to the same extent as a municipal corporation but, rather, that a county and its agencies are completely immune from suit for negligence in the absence of statutory authorization for such a suit. See also *Thacker, supra*, at page 21. The defense of sovereign immunity is available even to a municipal corporation with respect to alleged negligence in a performance of a governmental function. *Williams v. City of Columbus* (1973), 33 Ohio St. 2d 75.

The constitutional arguments raised by the first, second, third, and fifth assignments of error have been essentially answered by the Ohio Supreme Court in *Krause, Admr., v. State* (1972), 31 Ohio St. 2d 132, the fourth paragraph of the syllabus of which expressly states:

"Section 16 of Article I of the Ohio Constitution does not offend the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution."

Plaintiff attempts to phrase the issue differently by

referring to "a fundamental right of access" to the courts of Ohio. Insofar as the Ohio Constitution is concerned, it is Section 16, Article I which gives the right of access to the courts.

More importantly, plaintiff has not been denied a right of access to the courts because, as the Supreme Court has consistently held, no such right exists to sue the state or its instrumentalities, including counties and its agencies. Plaintiff seeks to have this court, in effect, overrule the many decisions of the Ohio Supreme Court holding that there is no right of access to the Ohio courts to sue the state or its instrumentalities, including counties and their agencies, unless such a right is conferred by statute.

Furthermore, the doctrine of sovereign immunity does not completely deny access to the courts to a party claimed to have been injured by the negligence of an employee of the state or county. The immunity from suit afforded by the doctrine of sovereign immunity does not extend to the employee of the state whose negligent conduct has caused the injury. Such an employee is liable for his own negligence in the absence of either statutory or common law immunity. See the unreported decisions rendered in *Chapman v. Cooper*, No. 72AP-15, Court of Appeals for Franklin County, May 23, 1972 (1972 Decisions, page 1565), and *State Fish, Inc., v. William Nye*, No. 72AP-206, Court of Appeals for Franklin County, November 14, 1972 (1972 Decisions, page 2950). See also *Stine v. Atkinson* (1942), 69 Ohio App. 529, 532.

The issues raised by the first, second, third, and fifth assignments of error have previously been determined by the Supreme Court of Ohio, and there has been no unconstitutional denial of access to the Ohio courts.

Accordingly, the first, second, third, and fifth assignments of error are not well taken.

The fourth assignment of error raises a new issue not previously disposed of by the Supreme Court, since plaintiff contends that R. C. 2743.01, as construed with R. C. 2743.02(A), is unconstitutional. Even if we were to agree with plaintiff, she still would not be entitled to maintain her action against the county agencies involved. By R. C. 2743.02(A), the state waives its immunity from liability and consents to be sued. However, by definition of R. C. 2743.01(A), the word "state" does not include political subdivisions of the state. Accordingly, there is a clear intent of the legislature not to waive governmental immunity from liability with respect to political subdivisions, except to the extent that there are specific statutes so doing.

In effect, plaintiff seeks to have this court amend the language of R. C. 2743.01(A) in defining the word "state," that: "it does not include political subdivisions," so as to delete the word "not" from that sentence. This we cannot do.

It is quite clear that the exclusion of political subdivisions from the waiver of immunity cannot be severed from the waiver of immunity with respect to the state itself. If we were to find the statute to be unconstitutional as contended by plaintiff, then necessarily there would be no waiver of immunity. The entire statute would have to be found to be unconstitutional, including the waiver of immunity from liability in its entirety. This would afford plaintiff no relief but would, rather, return the status of the law to the same state that it was prior to the enactment of R. C. 2743.01, *et seq.*

However, we find no constitutional infirmity in the

statute. Waiver of sovereign immunity as to one agency or for one or more purposes has long been recognized. The situation at the time of *Krause, supra*, was that there had been waiver of immunity with respect to some agencies and not others. In *Schaffer, supra*, the Supreme Court discussed R. C. 305.12, which waives the immunity of a county from liability for certain purposes but not others. See also *Thacker v. Bd. of Trustees of Ohio State Univ.* (1973), 35 Ohio St. 2d 49.

We find R. C. 2743.02(A) and 2743.01 to be constitutional and not to constitute a denial of the equal protection of the law to anyone because the state has waived immunity as to the state itself, but not political subdivisions. The extent to which the state wishes to waive sovereign immunity is a matter for the state to determine. The fact that the state waived as to some circumstances and not others does not constitute a denial of the equal protection of the law. There is a rational basis for the distinction between the state itself and political subdivisions of the state. The basic argument was rejected by the Supreme Court in *Krause, supra*, although the statute had not at that time been enacted. Accordingly, the fourth assignment of error is not well taken.

By the sixth assignment of error, plaintiff contends that the trial court erred in dismissing her action against the defendants, since the cases relied upon by the trial court can be distinguished from this case.

As to defendants Alum Crest and the Franklin County Commissioners, we find, as indicated above, no basis for distinction between the instant case and the prior decisions of the Supreme Court, particularly *Schaffer*. The trial court did not err in entering the

September 23, 1975, judgment in favor of those defendants. As to those defendants, and that judgment, the sixth assignment of error is not well taken.

As to the November 3, 1975, judgment, dismissing plaintiff's action as to defendant Gall, a different situation is presented. Defendant Gall was an employee of the county. The amended complaint alleges that Gall "negligently and/or recklessly and without due and proper care for the welfare of the plaintiff, and in disregard of her rights, did forcefully lift the plaintiff from her bed and sling her over his shoulder," causing injuries to plaintiff, including a severely broken left arm. For the reasons set forth above with respect to other assignments of error, defendant Gall is not entitled to the protection of the sovereign immunity of the county. There is no basis before the court at this time to afford any immunity whatsoever to defendant Gall. The amended complaint states a claim for relief against him. The trial court erred in dismissing the action as against defendant Gall. As to the November 3, 1975, judgment in favor of defendant Gall, the sixth assignment of error is well taken.

For the foregoing reasons, the first five assignments of error are overruled, and the sixth assignment of error is overruled as to the September 23, 1975, final judgment in favor of defendants Alum Crest and Franklin County Commissioners, and the said September 23, 1975, final judgment of the Franklin County Court of Common Pleas in favor of defendants Alum Crest and Franklin County Commissioners is affirmed, but the sixth assignment of error is sustained as to the November 3, 1975, judgment in favor of defendant Gall, and the November 3, 1975, judgment of the Franklin County Court of Common Pleas herein dis-

missing this action as against defendant Thomas Gall is reversed, and this cause is remanded to that court for further proceedings in accordance with law consistent with this decision.

Judgments affirmed in part and reversed in part, and cause remanded.

HOLMES AND MCCORMAC, JJ., concur.

APPENDIX D

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

Case No. 75CV-07-2750

DORA M. FRAZIER,

Plaintiff,

vs.

ALUM CREST, et al.,

Defendants.

JUDGMENT

This cause came on to be heard on the motion of Defendant Thomas Gall, to dismiss the action on the grounds of the Plaintiff's failure to state a claim for which relief might be granted, and the Court having granted the motion, it is hereby.

ORDERED AND DECREED that the action be dismissed on the merits and that the Defendant recover his cost.

And, the Court expressly determining under Rule 54B, Ohio Rules of Civil Procedure, that there is no just reason for delay in entering final judgment upon the motion to dismiss of Thomas Gall, hereby enters final judgment dismissing the complaint against Thomas Gall.

CRAIG WRIGHT, Judge

Approved:

GEORGE C. SMITH

Prosecuting Attorney

CHARLES I. COHEN COHO 2

*Assistant Prosecuting Attorney**Attorney for Defendant.*

DAVID K. FRANK/per attorney CIC

PHILIP Q. ZAUDERER

Attorneys for Plaintiff.

APPENDIX E

COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO

Case No. 75CV-07-2750

DORA M. FRAZIER

Plaintiff,

vs.

ALUM CREST, ET AL.,

Defendants.

DECISION AND ENTRY

Rendered this 28th day of October, 1975.

WRIGHT, J.,

Motion of defendant, Thomas Gall, to dismiss the amended complaint against said defendant is well-taken and is SUSTAINED.

CRAIG WRIGHT, Judge

APPEARANCES:

PHILIP Q. ZAUDERER and

DAVID K. FRANK

Attorneys for Plaintiff

GEORGE C. SMITH,

Prosecuting Attorney,

by CHARLES I. COHEN,

*Assistant Prosecuting Attorney**for defendants*

APPENDIX F

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

Case No. 75CV-07-2750

DORA M. FRAZIER,

Plaintiff,

vs.

ALUM CREST, et al.,

Defendants.

JUDGMENT

This cause came on to be heard on the motion of Defendants Alum Crest and the Franklin County Commissioners, Harold M. Cooper, Michael J. Dorrian and Robert T. Southwick, to dismiss the action on the grounds of the Plaintiff's failure to state a claim for which relief might be granted, and the Court having granted the motion, it is hereby.

ORDERED AND DECREED that the action be dismissed on the merits and that the Defendants recover their costs.

And, the Court expressly determining under Rule 54B, Ohio Rules of Civil Procedure, that there is no just reason for delay in entering final judgment upon the motion to dismiss of Alum Crest and the Franklin County Commissioners, hereby enters final judgment dismissing the complaint against Alum Crest and Franklin County Commissioners.

CRAIG WRIGHT, Judge

Approved:

GEORGE C. SMITH

Prosecuting Attorney

CHARLES I. COHEN

*Assistant Prosecuting Attorney**Attorney for Defendants.*

DAVID K. FRANK/per auth. CIC

PHILIP Q. ZAUDERER/per auth. of D. Frank—CIC

Attorneys for Plaintiff.

APPENDIX G

COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO

Case No. 75CV-07-2750

DORA M. FRAZIER

Plaintiff,

vs.

ALUM CREST, ET AL.,

Defendants.

DECISION AND ENTRY

Rendered this 15th day of September, 1975.

WRIGHT, J.,

The Court has carefully considered the motion to reconsider its previous decision and has reviewed plaintiff's excellent brief. However, the Court is still unwilling to overrule the various Supreme Court cases which militate against plaintiff's position. Therefore, its original decision will stand.

Entry pursuant to Rule 3901.

CRAIG WRIGHT, Judge

APPEARANCES:

DAVID K. FRANK and
PHILIP Q. ZAUDERER
Attorneys for Plaintiff

CHARLES I. COHEN
*Assistant Prosecutor
Franklin County, Ohio*

APPENDIX H

IN THE COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO

No. 75CV-07-2750

DORA M. FRAZIER,

Plaintiff,

vs.

ALUM CREST, et al.,

Defendants.

DECISION AND ENTRY

This action was brought by Plaintiff for injuries suffered as a result of the negligence of an unnamed county employee of Alum Crest, a nursing facility operated by Franklin County. Defendants, Harold Cooper, Michael Dorrian and Robert Southwick along with Alum Crest ask for dismissal.

Regardless of the Court's personal views with respect to the doctrine of sovereign immunity, it is bound to follow the Ohio Supreme Court's holding in *Krause v. State of Ohio* (1972), 31 Ohio St. 2d 132, and *Shaffer v. The Board of Trustees of Franklin County Veterans Memorial*, 171 Ohio St. 228, and dismiss this suit as prayed for.

Shaffer was cited with approval in *Krause* and appears to be right on point. Ohio Revised Code 2743, et seq., is obviously inapplicable and there is nothing in the Complaint that would suggest an exception to the above-named cases supporting individual liability.

Accordingly, Defendant's motion is sustained. Entry pursuant to Rule 39.01.

CRAIG WRIGHT, Judge

APPENDIX I

IN THE COURT OF APPEALS
OF FRANKLIN COUNTY, OHIO

Case No. 75 AP-547

DORA M. FRAZIER,

Appellant,

vs.

ALUM CREST, ET AL.,

Appellees.

NOTICE OF APPEAL TO THE SUPREME
COURT OF THE UNITED STATES

- I. Notice is hereby given that Dora M. Frazier, the above-named appellant, hereby appeals to the Supreme Court of the United States from the final judgment rendered herein by the Court of Appeals of Franklin County, Ohio, on April 1, 1976, sustaining the constitutionality of Section 2743.01 *et seq.* of the Ohio Revised Code.
- II. Appellant's motion to certify the record in this case was overruled by the Supreme Court of the State of Ohio on September 24, 1976.
- III. This appeal is taken pursuant to the provisions of 28 U.S.C. 1257(2).

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CERTIFICATE OF SERVICE

I, Philip Q. Zauderer, a member of the bar of the Supreme Court of the United States, and a counsel for Dora M. Frazier, appellant herein, hereby certify that a copy of this Notice of Appeal was served this date upon George C. Smith, Prosecuting Attorney for Franklin County, Ohio, and upon Charles I. Cohen, Assistant Prosecuting Attorney for Franklin County, Ohio, by mailing a copy to each of them at their office in the Franklin County Hall of Justice in Columbus Ohio, by first class mail postage pre-paid, in compliance with Rule 33(1) of the Rules of the Supreme Court of the United States; and that all parties required to be served have been served.

12-10-76

Date of Service

PHILIP Q. ZAUDERER

JAN 21 1977

MICHAEL RODAK, JR., CLERK

**IN THE
Supreme Court of the United States**

October Term, 1976

Case No. 76-857

DORA M. FRAZIER,

Appellant,

vs.

ALUM CREST, ET AL.,

Appellees.

BRIEF IN OPPOSITION TO JURISDICTION

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BRIEF IN OPPOSITION TO JURISDICTION

Opinions Below

The Appellant has accurately set forth the opinions below.

Jurisdiction

The jurisdictional requests are adequately set forth in the petition.

Statutes Involved

The Appellant has adequately set forth sections 2743.01 and 2743.02(A) of the Ohio Revised Code. The Appellees would add, however, Article 1, Section 16 of the Ohio Constitution which provides:

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without

denial or delay. Suits may be brought against the state, in such courts and in such manner as may be provided by law. (Adopted September 3, 1912).

Questions of Law Presented

The questions of law as presented by the Appellant are correctly stated.

Statement of the Case

The statement of the case as presented by the Appellant is adequately stated except that negligence has not been proven and there was a denial of the said negligence.

Argument

This case deals basically with the issue of sovereign immunity and whether or not Ohio's solution to the problem is in contravention of the United States Constitution. That solution is the Court of Claims Act, Sections 2743.01 and 2743.02(A) of the Ohio Revised Code.

The State of Ohio may only be sued in such courts and in such manner as may be provided by law. Article 1, Section 16, Ohio Constitution. The legislature has enacted the Court of Claims Act to provide the means by which the State may be sued. That consent does not apply to the subdivisions, i.e. the counties in this case.

Thus, since the State of Ohio has not given consent for the subdivision to be sued, then it is bared by the doctrine of sovereign immunity. Several U. S. Supreme Court cases support this contention. *Ford Motor Co. v. Treasury Dept.*, 323 U.S. 459 (1934); *Ex Parte: New York*, 256 U.S. 490 (1921).

Furthermore, Sections 2743.01 and 2743.02(A) of the Ohio Revised Code, do not contravene the equal pro-

tection clause of the Fourteenth Amendment of the Constitution of the United States. *Lindsley v. National Carbonic Gas Co.*, (1911), 220 U.S. 61; *Dandridge v. Williams*, (1970), 397 U.S. 471. The court in *Dandridge v. Williams*, *supra*, stated on page 485:

"The problems of government are practical ones and may justify, if they do not require, rough accommodation-illogical, it may be, and unscientific." *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70, 33 S. Ct. 441, 443, 57 L.Ed. 730. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 336 U.S. 420, 426, 81 S. Ct. 1101, 1105, 6 L.Ed. 2d 393.

Sections 2743.01 and 2743.02(A) of the Ohio Revised Code do not deny due process or the right to access to courts. *Boddie v. Connecticut*, (1971), 401 U.S. 371. The court in that case spoke of the Due Process clause on page 381 and stated:

We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship. The requirement that these appellants resort to the judicial process is entirely a state-created matter.

Conclusion

For the reasons cited heretofor, the Appellees respectfully request this Court to deny jurisdiction to this case. The issues presented regarding sovereign im-

munity have been well litigated. Furthermore, the new Court of Claims Act does not alter the situation in such a manner as to deprive the Appellant of her constitutional rights as guaranteed by the United States Constitution.

Respectively submitted,

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Counsel for Appellees.

CERTIFICATE OF SERVICE

I, Alan C. Travis, Counsel for Appellees herein, and a member of the Bar of the Supreme Court of the United States hereby certify that on the day of January, 1977, I served three copies of the foregoing Brief in Opposition to Jurisdiction, by mailing the copies in a duly addressed envelope to Mr. Philip Q. Zauderer, and David K. Frank, 16 East Broad Street, Suite 301, Columbus, Ohio 43215. I further certify that all parties required to be served have been served.

ALAN C. TRAVIS
Assistant Prosecuting Attorney
Counsel for Appellees